IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No.....................

THE CITY NATIONAL BANK AND TRUST COMPANY, TRUSTEE, UNDER TRUST AGREEMENT WITH HAMILTON DEPOSITORS OF HAMILTON TRUST SHARES, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I

THE OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit in this case is reported in *City National Bank & Trust Co. v. Commissioner*, 142 Fed. (2d) 771. This decision is found in the Record at page 282. The memorandum opinion of the Board of Tax Appeals, not reported, entered October 18, 1941, is found at page 11 of the Record.

II

JURISDICTION

The jurisdiction of the court is invoked under Sec. 240 (a) of the Judicial Code as amended. The judgment of the

United States Circuit Court of Appeals was entered on May 13, 1944. Petition for rehearing was filed on May 31, 1944, and denied on July 7, 1944.

III

STATEMENT OF THE CASE

A statement of the case is contained in the petition for certiorari, p. 3.

IV

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In reversing the decision of the Tax Court and giving judgment for the Commissioner.

2. In holding that the fixed investment trust here involved resembled a corporation and was an association taxable as a corporation.

3. In holding the trust to be a medium for the conduct of business and sharing its gains.

4. In holding that the income here taxed was taxable to the trust though its very receipt by the trustee created a corresponding indebtedness to the individual beneficial owners of the securities from which the income was derived.

5. In exceeding its power by overturning the determination of the Tax Court in the foregoing matters, that determination being final under the law.

V

ARGUMENT

1. The Circuit Court is Without Power to Overturn the Fact Determination of the Tax Court.

The controversy between the Tax Court and the Second and Ninth Circuits on the one hand and the Third and Tenth Circuits on the other as to the status of the fixed investment trust for tax purposes revolves primarily around the question of fact as to whether in that particular

type of trust the plan provides a medium for the conduct of business and sharing its gains with the ownership of capital as in a corporation, or whether it affords a means of investment to the individual in which the trustee acts primarily as an agent for the individual collecting and distributing the income and holding and conserving the corpus.*

The Tax Court held in this case, and has consistently held, that the fixed investment plan did not provide a medium for the conduct of business and sharing of its gains. The courts are all agreed that this factual test laid down by the Supreme Court in the case of *Morrissey v. Commissioner*, 296 U. S. 344, 80 L. ed. 262, is decisive in each case. It has long been the rule of the Supreme Court that the determination of the Tax Court on questions of fact is final and conclusive on the regular courts if there is any evidence to support it. The importance of this rule to a proper administration of the tax laws is forcefully presented by Mr. Justice Jackson in the court's opinion in *Dobson v. Commissioner*, 320 U. S. 489, decided December 20, 1943, in which he points out that while the prior cases had consistently held that the power to weigh the evidence and draw the conclusions and inferences therefrom lay in the Tax Court, that heretofore the regular courts had failed to give to the doctrine the finality given to administrative determination in other fields. The court said (p. 501):

> " * * * However, all that we have said of the finality of administrative determination in other fields

*In the Report of the Securities & Exchange Commission on "Fixed and Semi-Fixed Investment Trusts" in 1940, the Commission says (p. 8): "Management investment companies are generally corporate in form with legal title to all assets vested in the corporation. The investor in that type of investment company is a stockholder and as in other corporations has only an undivided participating right in the earnings and profits of the corporation and a proportionate participating rights in the property of the corporation on its liquidation.

"In the fixed trust on the other hand, the legal title to or the ownership of the trust property is vested in a trustee, usually a bank or trust company, which derives its power from a trust agreement between itself and the depositor and the owners of the trust certificates. The investor, like any other beneficiary of a trust, or cestui que trust, has a beneficial undivided interest in specific deposited securities or property."

is applicable to determinations of the Tax Court. Its decisions, of course, must have 'warrant in the record' and a reasonable basis in the law. But 'the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' * * *

"Congress has invested the Tax Court with primary authority for redetermining deficiencies, which constitutes the greater part of tax litigation. This requires it to consider both law and facts. Whatever latitude exists in resolving questions such as those of proper accounting, *treating a series of transactions as one for tax purposes, or treating apparently separate ones as single in their tax consequences,* exists in the Tax Court and not in the regular courts; *when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decisions of the Tax Court must stand.*" (Italics supplied.)

Again, on the same day in *Commissioner v. Heininger,* 320 U. S. 467, the court re-emphasized its determination to make final the decisions of the Board of Tax Appeals, saying (p. 475):

> " * * * *Except where a question of law is unmistakably involved* a decision of the Board of Tax Appeals on these issues, having taken into account the presumption supporting the Commissioner's ruling, should not be reversed by the federal appellate courts."

In *Wilmington Trust Co. v. Helvering,* 316 U. S. 164, Mr. Justice Douglas, speaking for the court, said (p. 168):

> " * * * It is the function of the Board, not the Circuit Court of Appeals, to weigh the evidence, to draw inferences from the facts, and to choose between conflicting inferences. The court may not substitute its view of the facts for that of the Board. Where the findings of the Board are supported by substantial evidence they are conclusive."

Clearly, the determination of the Tax Court in this case that the investment trust plan here creates no medium for the conduct of business and the sharing of its gains and that therefore it is not an association taxable as a corporation, is a determination of an ultimate question of fact.

The divergence among the Circuits arises from the different inferences drawn from the facts in the investment trust cases and from a lack of understanding of the fundamental difference between the common form of fixed and management trusts. There is no difference of opinion as to the law if the facts are as the Tax Court found them. The multitude of tax controversies which will arise with the ever-mounting tax burden may well overwhelm the regular courts unless factual determinations such as these are left to the expert opinion of the administrative tribunal equipped to handle the thousands of tax cases that annually come before it.

The finding of the Tax Court in this case that the trust is not an association taxable as a corporation carries with it the implication that it is a mere conduit through which the income from the underlying securities flows to the owners thereof. This is confirmed by the Circuit Court's own statement in its opinion (R., p. 289):

> " * * * It is true that if the trustee receives income from the underlying securities, its receipt creates a corresponding indebtedness to the individual beneficiary and that the beneficial interest of the underlying securities was in the beneficiaries."

On that state of facts the question as to whether the income on these underlying securities (which is the sole income involved in this proceeding) should be burdened twice—once with corporation taxes when received by the trustee and again with individual taxes when passed on to the beneficiaries—is a determination that the Supreme Court in the *Dobson case, supra*, declared to be peculiarly within the province of the Tax Court.

> " * * * Whatever latitude exists in resolving questions such as those of proper accounting, treating

a series of transactions as one for tax purposes, or treating apparently separate ones as single in their tax consequences, exists in the Tax Court and not in the regular courts; * * *" (pp. 501, 502).

We submit that the Circuit Court of Appeals has exceeded its power in overturning the determination of the Tax Court in this case and that its decision in so doing is in conflict with the Supreme Court cases cited.

2. The Circuit Court Decision is in Conflict with Decisions of the Second and Ninth Circuits and with the Settled Rule of the Tax Court.

In *Chase National Bank v. Commissioner,* 41 B. T. A. 430, a trust quite similar to that involved here was passed on by the Board of Tax Appeals. The Board in its syllabus says:

> "Fixed investment trusts under which for the purpose of conserving the trust property, the trustee has ministerial functions of holding corpus and collecting and distributing income and sales proceeds and a 'Depositor' has limited power to direct sales so as to eliminate unsafe investments but has no power to direct reinvestment, *held* not taxable as associations."

The opinion of the Board there is declared by it to be applicable to the trust here involved. It says in the *Chase case* (p. 442):

> "The plan clearly provides no 'medium for the conduct of a business and sharing its gains,' and the trustee's operations under them can not properly be called 'an enterprise for the transaction of business,' which the Supreme Court in *Morrissey v. Commissioner,* 296 U. S. 344, regarded as implicit in the statutory term 'association.' *The collection and distribution of income, the sales of securities and other acts of the trustee, and the acts of the depositor are but incidental to the holding and conservation of the corpus.* * * * " (Italics supplied.)

The Circuit Court of Appeals, in upholding the Board

in the *Chase Bank* case, *Commissioner v. Chase National Bank,* 122 Fed. (2d) 540, said (p. 543):

> " * * * What they were when created is determinable from the trust agreements and the application of the principles set forth in Morrissey v. Commissioner, 296 U. S. 344, 56 S. Ct. 289, 80 L. Ed. 263, leads to the conclusion, in support of the Board's decision, *that the trust property was to be held for investment and not to be used as capital in the transaction of business for profit like a corporation organized for such a purpose. This distinction is what makes the difference taxwise.* Sears, Trustee, v. Hassett, 1 Cir., 111 F. 2d 961." (Italics supplied.)

The principles above enunciated are, we submit, decisive of the controversy here.

In *Buckley v. Commissioner,* the Board of Tax Appeals, in a memorandum decision entered March 3, 1941, being Decision 11,696 C, opinion by Judge Opper, reaffirmed its ruling in the *Chase Bank* case, *supra.*

In affirming that opinion, the Circuit Court of Appeals for the 9th Circuit, *Commissioner of Internal Revenue v. Buckley,* 128 Fed. (2d) 124, said (p. 125):

> "We are told that the Securities and Exchange Commission has classified this entity as an investment trust of the fixed, open-end variety."* "It belongs in the same category as the investment trust involved in Commissioner v. Chase Nat. Bank, 2 Cir., 122 F. (2d) 540, 543. The court there thought that '*the trust property was to be held for investment and not to be used as capital in the transaction of business for profit like a corporation organized for such a purpose.*' * * *

It has similarly classified the trust in the pending case (Findings of Fact, R., pp. 17, 18): "In view of the fact that the portfolio is a fixed portfolio, requiring apparently little or no management or supervision, it appears that reference to a 'management fee,' without some qualification, has the capacity to mislead." Again, referring to the duties of the trustee or custodian, the Securities and Exchange Commission held (R., p. 18): " * * we believe the statement should be clarified so as to indicate that the duties of the custodian which are prescribed in detail by the trust agreement are solely ministerial and custodial in nature."

> "The commissioner did not seek certiorari in the Chase Nat. Bank case although he claims the decision was wrong. His fundamental thesis is that for tax purposes all investment trusts should be classified as corporations. If the commissioner is correct in this, it would seem that the courts have been expending much useless labor on the subject." (Italics supplied.)

In *Equitable Trust Co. v. Magruder,* (D. Ct., Md., decided March 12, 1941) 37 Fed. Supp. 711, there was involved a capital stock tax on a fixed trust. The court's reasoning is unanswerable. It closely describes the arrangement here. Said the court (pp. 713, 714):

> "It is important to note that the trustee has no power or discretion to deal with the amounts deposited by the holders of the certificates other than the purchase of the shares of stock of the Income Foundation Fund, Inc., after the deduction of the small percentages for expenses. * * * These are the essential features of the agreement although there are a large number of subordinate provisions which, in somewhat meticulous detail, define the respective obligations of the parties, and their exemptions from liability other than those expressly assumed. These details are not uncommon in agreements where a banking institution acts as trustee for a limited and particular purpose."

Continuing, the court said (pp. 715, 716):

> "*As was said in the Morrissey case, an association implies associates, who must have a common interest in a common business enterprise.* It cannot be said that the several depositors in this case have any common association or interest in a common enterprise of which the Equitable Trust Company as Trustee is the managing agent. *The relationship of the trustee to the depositors is several and not joint, and there are no relations whatever of the several depositors inter sese. In this respect, they have nothing in common more than the individual depositors in any bank.* * * * *Under the agreement there is no relationship or obli-*

gation running from the trustee to the depositors as a group, but only to each of them separately under their respective certificates. The amounts of the several deposits with the trustee are not pooled in a common fund for joint benefit but are held and invested for the depositors severally and without regard one to another. * * *

"Nor can it properly be said that the Equitable Trust Company is the manager of a business trust or business enterprise, such as existed in the Morrissey case and the three cases following it. Not only is the obligation of the trustee several and not joint with respect to the depositors, but *the powers and duties of the trustee are strictly prescribed and limited with respect to the funds deposited by each depositor.* Indeed, it may be properly said that the duties of the trustee are purely ministerial. It must apply the balance of the deposit, over and above the deducted expenses, to one and only one purpose—the purchase at current market price of shares of stock of Income Foundation Fund, Inc.; and upon surrender of the certificate which evidences the trust, the sole duty of the trustee is to sell the applicable shares of stock at the current market price and pay over the net proceeds to the beneficiary. Likewise, as to the dividends received on account of the stockholdings, the trustee is required to reinvest them in the purchase of further shares of the same stock or, at the option of the beneficiary, pay them over to him." (Italics supplied.)

All of this is true of the Hamilton Trust.

The Sixth Circuit strongly leans to the position taken by the Tax Court and the Second and Ninth Circuits.

In *Cleveland Trust Co. v. Commissioner,* (CCA 6) 115 Fed. (2d) 481, the court said (pp. 483, 484):

"As we view the facts here, one of the essential attributes of a taxable association growing out of a trust is absent, i.e., that of holding and operating property by a trustee for profit. * * *

"* * * The trust instrument shows no plan to carry on a business in buying, selling, leasing or dealing in real estate."

Again, in *United States v. Davidson*, (CCA 6) 115 Fed. (2d) 799, the court held the *sina qua non* of taxability was the presence of a joint enterprise.

Again in *Commissioner of Internal Revenue v. Gibbs-Preyer Trusts Nos. 1 and 2*, 117 Fed. (2d) 619, the Circuit Court of Appeals for the Sixth Circuit emphasizes that the capital supplied by the investors must be used in a joint enterprise involving the sharing of gains if the trust is to be held to be taxable as an association.

The recent decision of the Third Circuit in *Pennsylvania Co. v. Commissioner*, 138 Fed. (2d) 869, decided November 16, 1943, is flatly contrary to the *Chase National Bank* case, *supra*, to the *Buckley* case, *supra*, and to the decision of the Tax Court in this case. It completely overlooks the fundamental tests that are conclusive of this case and should have been conclusive of that. Without even mentioning it or apparently seeing it, it, as does the Tenth Circuit, leaps the gap between individual ownership and group ownership, holding that because the trust supplies a service to the individual which enables him individually to invest or speculate in undivided interests in the underlying securities, therefore the gain and income from each individual investment must be lumped for tax purposes so that the government can collect an income tax and an excess profits tax on the lump as though it actually beneficially belonged to an entity or association similar to a corporation. Of course, a brokerage house renders this very service for full shares of stock, but it has not yet been suggested that the income of all of its customers is taxable to the brokerage house. For an amazing statement of that proposition, see the two paragraphs at the close of the opinion preceding its discussion of the *Magruder* case, *supra*.

3. The Ruling of the Circuit Court is in Conflict with Morrissey v. Commissioner, 296 U. S. 344.

The leading Supreme Court discussion of the concept of a trust as a taxable entity is found in *Morrissey v. Commissioner, supra.* In that case the organizers of the "Western Avenue Golf Club" by declaration of trust conveyed property to the trustees and authorized the trustees to receive the rents, profits and income from the operation of the club and generally to manage the trust estate "as if the trustees were its absolute owners." Shares were issued to the organizers, "*a shareholder's interest being to receive dividends as declared.*" Please note—"*a shareholder's interest being to receive dividends as declared.*" (*Morrissey v. Commissioner,* 74 Fed. (2d) 803.) The principal contention of the taxpayer was that the proper test to be applied was whether the trustees act or carry on their business after the form and manner of a corporation in which the beneficiaries have a voice in the management and an opportunity to exercise such control through the right to vote at meetings. The Supreme Court held (pp. 357, 358):

> "The inclusion of association with corporations implies resemblance; but it is resemblance and not identity. * * * the absence of particular forms, or the usual terminology of corporations, cannot be regarded as decisive."

> p. 359) "What, then, are the salient features of a trust—*when created and maintained as a medium for the carrying on of a business enterprise and sharing its gains*—which may be regarded as making it analogous to a corporate organization?" (Italics supplied.)

The Supreme Court then recites the *five secondary tests* relied on by the Circuit Court: (1) A continuing entity throughout the trust period. (2) Centralized management. (3) Continuity of the trust, uninterrupted by death, among the beneficial owners. (4) Means for transfer of beneficial interests. (5) Limitation of personal liability of participants to property embarked in the undertaking.

The Supreme Court continues (pp. 359, 360):

"It is no answer to say that these advantages flow from the very nature of trusts * * *. *The suggestion ignores the postulate that we are considering those trusts which have the distinctive feature of being created to enable the participants to carry on a business and divide the gains which accrue from their common undertaking,—trusts that thus satisfy the primary conception of association and* have the attributes to which we have referred, distinguishing them from partnerships. *In such case,* we think that these attributes make the trust sufficiently analogous to corporate organization to justify the conclusion that Congress intended that *the income of the enterprise* should be taxed in the same manner as that of corporations." (Italics supplied.)

Moreover, at p. 356, the court says:

"'Association' implies associates. It implies the entering into a joint enterprise, and as the applicable regulation imports, an enterprise for the transaction of business."

Then referring to the beneficiaries of an ordinary trust (p. 357):

"* * * Such beneficiaries do not ordinarily, and as mere cestuis que trust, *plan a common effort or enter into a combination for the conduct of a business enterprise.* * * * But the nature and purpose of the cooperative undertaking will differentiate it from an ordinary trust. *In what are aclled 'business trusts' the object is not to hold and conserve particular property with incidental powers,* as in the traditional type of trusts, but to provide a medium for *the conduct of a business and sharing its gains.*" (Italics supplied.)

The Circuit Court stresses the secondary tests and disregards the foundation—the primary test—on which they must rest in order to have any significance in characterizing

a trust as an association taxable as a corporation. Those primary, fundamental requirements stressed again and again by the court rest on a *combination of beneficiaries in a common business enterprise,* the "gains from the *common undertaking*" to be divided. There must be possible "*income from the enterprise.*" Moreover, there must be a resemblance between the trust sought to be taxed and a corporation.

As appears from the facts hereinbefore set forth, there is no resemblance whatever in this case to corporate form. The certificate has not the slightest resemblance either in form or fundamental character to the stock certificate of a corporation. It merely requires Hamilton to buy with the investor's money securities in which the investor retains an undivided interest—not an interest in any group or entity.

The only sale ever made in the entire history of the trust was at the request of one Harry Jackson who owned beneficial undivided interests equal to eight shares of each of the underlying stocks. When this stock was sold he received all of the proceeds. The net assets of the group or enterprise and each of the remaining individuals were precisely the same the moment before and the moment after the sale whether the price received was high or low. Suppose each and every investor—as Jackson did—had his interest in the underlying stocks liquidated at the same time. Every investor has a different cost for his part of the underlying stocks. One gains, another loses. But the group as a whole neither gains nor loses. Suppose the market is such that on the date of this sale had the stocks belonged to a group or association there would have been a profit to it—in other words, suppose the total price received was greater than the total price paid for these underlying stocks—then if the enterprise is joint and if it is an association resembling a corporation, this gain would have to be divided pro rata—when and if distributed—to all of the stockholders or members of the association. This is of

the very essence of a common or corporate enterprise. Of course, if the enterprise is common, everyone shares the gain. But Jackson bought his share of these stocks when the price was low and Jones bought his share when the price was high. Jackson has a gain. Jones has a loss. The trustee certainly couldn't give Jones and the other losers a part of Jackson's profit. There can't be the slightest doubt under the trust agreement as to Jackson's rights. It is self-evident that the purchase and sale of any of the stocks is the speculation of the individual owner and not of a group or association—or of a trust which merely for a price furnishes services which assist the individual investor in carrying on his operation.

The enterprise cannot be common or joint or similar to a corporation when it is impossible on a sale of the underlying assets to have a common gain divisible pro rata among the members and when it is a matter of complete financial indifference to the group as a whole and to everyone save the individual whose interest in the underlying stocks is sold, whether the price is at the peak or at the bottom of the market.

The ownership of the trust assets by individuals rather than by the group with the right to withdraw their share at will and the right of each individual to his share of the dividends on those underlying securities, rebuts any claim of corporate resemblance in the trust.

3(a). Ownership by Investors of the Underlying Assets Negates All Possibility of Corporate Resemblance.

Said Mr. Justice Holmes in *Klein v. Board of Tax Supervisors,* 282 U. S. 19, 24, 75 L. ed. 140, 143:

> "But it leads nowhere to call a corporation a fiction. If it is a fiction, it is a fiction created by law with intent that it should be acted on as if true. *The corporation is a person, and its ownership is a non-conductor that makes it impossible to attribute an interest in its property to its members.* Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, 273, 52 L. ed. 481,

487, 28 S. Ct. 288. The stockholders in some circumstances can call on the corporation to account, but that is a very different thing from having an interest in the property by means of which the corporation is enabled to settle the account." (Italics supplied.)

Over and over again has this principle been reiterated by the courts.

In *Eisner v. Macomber,* 252 U. S. 189, 64 L. ed. 521, the Supreme Court has in clear and convincing language delineated the fundamental nature of a corporation. Unless "opposites" are "likes" it leaves no room for a finding of corporate resemblance in the trust in this case where the beneficial ownership of the assets is in the individual investor in undivided interests. Said the court (pp. 529, 531, 532):

> "Certainly the interest of the stockholder is a capital interest, and his certificates of stock are but the evidence of it. They state the number of shares to which he is entitled and indicate their par value and how the stock may be transferred. They show that he or his assignors, immediate or remote, have contributed capital to the enterprise, that he is entitled to a corresponding interest proportionate to the whole,—entitled to have the property and business of the company devoted during the corporate existence to attainment of the common objects, — entitled to vote at stockholders' meetings, to receive dividends out of the corporation's profits if and when declared, and, in the event of liquidation, to receive a proportionate share of the net assets, if any, remaining after paying creditors. *Short of liquidation, or until dividend declared, he has no right to withdraw any part of either capital or profits from the common enterprise; on the contrary, his interest pertains not to any part, divisible or indivisible, but to the entire assets, business, and affairs of the company. Nor is it the interest of an owner in the assets themselves, since the corporation has full*

title, legal and equitable, to the whole. The stockholder has the right to have the assets employed in the enterprise, with the incidental rights mentioned; *but, as stockholder, he has no right to withdraw, only the right to persist, subject to the risks of the enterprise,* and looking only to dividends for his return. If he desires to dissociate himself from the company, he can do so only by disposing of his stock.

"* * * *None of these, however, gives the stockholders as a body, much less to any one of them, either a claim against the going concern for any particular sum of money or a right to any particular portion of the assets or any share in them unless or until the directors conclude that dividends shall be made and a part of the company's assets segregated from the common fund for the purpose.* * * * " (Italics supplied.)

3(b). The ~~Tax~~ Circuit Court Ruling that Though the Receipt of the Income Creates a Corresponding Indebtedness to the Individual Beneficiary Yet the Income is Taxable to the Trust, Is in Conflict with Decisions of the Court of Appeals for the District of Columbia, the Eighth Circuit and Settled Principles of Tax Law.

The settled principle of tax law that income can only be taxed to its *beneficial* owner is laid down in Mertens "Law of Federal Income Taxation" (1942) vol. 2, p. 599, where the author says:

"* * * Where the recipient of income is serving merely as a conduit or transmitter of such income, he is not liable for tax on such income. The purpose of the income tax laws is to tax income to the person who has the right or beneficial interest therein and not to throw the burden on a mere conduit, collector or innocent agent. The tax is laid only on what is received for one's own benefit."

In *Central Life Assur. Soc. v. Commissioner,* 51 Fed. (2d) 939, Judge Stone speaking for the Eighth Circuit said (p. 941):

> "Tax laws are essentially practical in their purposes and application, and the federal income tax laws are no exception. While, for purposes of convenience and certainty in collection of such taxes, it is sometimes provided that those who collect income for others shall pay therefrom the taxes thereon, yet a cardinal purpose of the income tax laws is to tax the income to the person who has the right or beneficial interest therein, and not to throw the burden upon a mere collector or conduit through whom or which the income passes."

In *112 West 59th Street Corporation v. Helvering*, 68 Fed. (2d) 397, Mr. Justice Groner speaking for the Court of Appeals for the District of Columbia, after quoting the above statement of Judge Stone, adds (p. 398):

> "We think this a correct statement of the law. If, therefore, it appears as we think it does appear, that petitioner was a mere 'conduit,' and that it never at any time had any legal right to retain the profits from the transaction in question and never at any time had possession of such profits, but that on the contrary the profits in right and in law were always the property of the trust, then it would seem to follow that the liability to pay the tax under the federal income tax laws was solely a liability of the trust and not a liability of petitioner."

The principle would seem self-evident that when an individual, corporation, or association receives money, the receipt of which automatically creates an equal and corresponding debt, it can have no net income therefrom. It is no better off after receiving a million dollars of such money than if it only received a thousand dollars or none at all.

In the pending case the investor's right under his contract is that of either a direct ownership in the money received from the underlying securities or a right arising on the receipt of the money by the trustee to be paid a corresponding amount, creating a direct debt on the part of the

trustee to pay it to him.* The books necessarily show at the end of the year under such an arrangement receipts of $111,116.81, as in one of the years here involved, and a corresponding indebtedness of $111,116.81 to the individual investors arising from the very receipt thereof. Each of the individual investors has income which he reports, but clearly the trust has none. The accountability of the trustee to the individual and not to a group is clear under the contract here involved and is admitted by the Circuit Court of Appeals.

*"The International Trust Company holds all the trust securities in its Trust Department, and all cash balances in its commercial banking department, as a debtor therefor" (R., p. 164).

VI

CONCLUSION

We submit that if the trust in this case is taxable as a corporation, then every fixed investment trust in the United States is so taxable. The hairline distinctions attempted to be drawn in some of the cases merely multiply the confusion that exists as to the governing principles. If all fixed investment trusts are to be taxed as associations, then the Treasury is entitled to know it and the government is entitled to collect the tax thereon all over the United States and not simply in the isolated circuits which at the present time so hold. If they are not so taxable, then the taxpayers who are being wrongfully penalized in the Tenth Circuit and in the Third Circuit are entitled to be relieved of this unfair and unjust burden. Moreover, if the Tax Court really has the authority that the *Dobson* case, *supra*, gives it, it will lead to a more orderly and fair administration of the tax law if that decision is made effective.

For the foregoing reasons it is submitted that a writ of certiorari should issue to the Circuit Court of Appeals for the Tenth Circuit.

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